

ADDENDUM TO AUGUST BOARD AGENDA ITEM #1 (continued from July Agenda Item #24)

During the Board's discussion of this item at its July monthly meeting several legal issues were raised regarding the Board's authority relating to Regional Agencies.

Background: Substantial Evidence Required to Disapprove Regional Agency

As noted in the agenda item, the Board could disapprove a Regional Agency if it determined that approval would "diminish the responsibility of individual cities and counties to implement source reduction, recycling, and composting programs as required by [the Act]...." (PRC 40970). In order to do so, the Board would need to have substantial evidence in the record that supported this determination.

"**Substantial Evidence**" in this context describes the type of evidence that an agency may rely upon in making determinations. When used in this context, the term "substantial evidence" excludes the use of speculation, opinion, or conjecture as support for an agency's findings. As noted in numerous court cases, this requirement is intended to prohibit a governmental agency from acting in an arbitrary and capricious manner. More simply put, the Board must base its decision upon factual information.

Question 1: Can the Board approve a Regional Agency, but only approve some of the proposed members?

Answer: Not Directly

Statute does not directly address this issue, but it appears that the Board would not have this authority. The Regional Agency statutes require that the Regional Agency be an independent legal entity (Joint Powers Authority - JPA) which has the authority and duties given to it by its members. As such, the JPA sets forth the structure, including financial provisions, for how it will accomplish its purpose. (Government Code section 6500 et seq.) In creating the JPA, municipalities are setting forth enforceable arrangements for doing so based upon each entities own police powers – it is essentially a contract between jurisdictions. Staff can not identify any legal authority that would allow the Board to re-write a joint powers agreement and to do so appears to be contrary to the authorizing statute. It could also result in a Regional Agency that is not capable of meeting its purposes due to the changes in its proposed membership.

However, if the Board determined that the inclusion of one or more members in the Regional Agency was a basis for disapproving it, it could disapprove the Regional Agency as a whole, indicating the reasons for the disapproval. The JPA would then have the option of revising its JPA to address the Board's reasons for disapproval and re-submit it to the Board. (Such a process would be consistent with the one used for review and approval of planning documents from individual jurisdictions (the Board states reasons for disapproval, and the jurisdiction can re-submit after revising the planning element – see PRC section 41810(b) and 41811).

Question 2: How did recent changes to the Regional Agency statute affect how Regional Agencies can distribute fines among their members?

Answer: It did not change the basic requirement – it added due process protections for member jurisdictions if the Regional Agency chose to distribute fines based upon fault.

Public Resources Code section 40974(b) was added by AB 1482 in 2002. This subsection provides that:

(b) (1) An agreement may provide that a city or county is subject to the portion of a penalty imposed upon a regional agency pursuant to Section 41850 that is in proportion to the city's or county's responsibility for failure to implement a source reduction and recycling element or household hazardous waste element, as determined by the regional agency.

(2) If an agreement provides for apportioning a penalty pursuant to paragraph (1), the regional agency shall provide the city or county with a written notice regarding the city's or county's responsibility, including the basis for determining the city's or county's proportional responsibility, and an opportunity for a hearing before the regional agency's governing body, before assessing the city or county a proportion of the penalty imposed by the board.

(3) This subdivision does not affect the authority of the board to impose a penalty pursuant to other provisions of this division.

Under the pre-existing law, a Regional Agency already had the authority to apportion fines based upon fault. Statute leaves the apportionment up to the members of the Regional Agency to decide, the only requirement is that the agreement provide some method for doing so. The Board has previously approved a number of Regional Agency agreements that apportion fines by fault. The primary change brought by this statute is to provide that if a Regional Agency decides to apportion fines by fault – it must do so through a process that provides notice and a hearing (i.e. due process).

In the case of the Los Angeles Area Regional Agency, the agreement does provide a method of apportioning fines – equal distribution. The Regional Agency's representative indicated at the July Board meeting that this method would be changed in its by-laws to one resembling the type described in this statute. Whether in the agreement, or in by-laws adopted pursuant to the agreement, such an arrangement is allowed by law. (A copy of the draft by-laws is attached).

Question 3: Can the Board approve the Regional Agency for a limited period of time?

Answer: Yes, if the Board had factual information showing the lack of a time limit would produce results contrary to the statute's intent.

Statute does not directly address this issue. However, if there was substantial evidence in the record to allow the Board to disapprove a Regional Agency (discussed above), that same authority **could** be used to provide an approval for a limited period of time – **if the time period could be related to this potential reduction in programs.**

Other Conditions

In reviewing the issues discussed above, staff have also considered the possibility of other conditions besides a time limit. As above, other conditions could be placed on the approval if there were substantial evidence in the record that approval without the conditions of the Regional Agency would result in a reduction of diversion programs. For example, the current version of the Resolution for this item provides that the Regional Agency members must still implement their individual SB 1066 Plans of Correction or their Compliance Order Local Assistance Plans. It is not currently phrased as a condition of approval – but rather to clarify the Board's expectations about the effect of approving the Regional Agency. As worded, failure to implement those plans would result in a fine for the Regional Agency. However, these provisions could be revised to turn them in to conditions of approval so that failure to implement the plans would result in termination of the Regional Agency.

Writing Conditions

Assuming the Board has substantial evidence to conditionally approve the Regional Agency, there may be significant logistical problems with doing so. For example, if the Board approves the Regional Agency conditional upon its successful completion of the Time Extension/Compliance Order Performance Plans and these are not in fact successfully completed – at the moment that the Board makes this determination, the Regional Agency could be viewed as being terminated. This would raise a number of legal issues such as: Would the Board have to issue a new Compliance Order (i.e. start over again) because the Compliance Order was issued against the Regional Agency which no longer existed? What would be the status of the individual jurisdictions retroactively? How should the individual jurisdictions be treated moving forward?

Depending upon the condition proposed, these types of issues might be satisfactorily addressed. However, staff would need additional time to draft appropriate conditional provisions once it receives specific direction from the Board.

DRAFT

Los Angeles Area Regional Agency

Bylaws of the Los Angeles Area Integrated Waste Management Authority

Section 1. Agency Structure and Meetings

1.1 Board.

1.1.1 The Governing Board of Directors (Board) shall be comprised of a representative from each of the Member jurisdictions. Each Member shall have one voting seat on the Board.

1.1.2 Each Member shall designate a representative and an alternative representative for their voting seat on the Board. The designation will be submitted to the Los Angeles Area Integrated Waste Management Authority (Agency) on Member letterhead by the signature authority of the Member. Changes in representation of a Member must be submitted in writing to the Manager before the new representative has the right to vote.

1.1.3 Each Board representative attending the Board meetings will receive one vote. Board representatives may not vote for multiple jurisdictions.

1.1.4 Each Member who is current with annual membership dues will be entitled to vote.

1.2 Officers

1.2.1 The Officers of the Board shall include a Chair, Vice-Chair, and Treasurer elected by a vote of Members.

1.2.2 The Officers will be elected by written ballot for a one-year term by a simple majority vote. Officers may serve additional terms if elected.

1.3 Committees.

1.3.1 The Agency will have two standing subcommittees; Finance and AB939 Compliance. The Treasurer will serve as Chair of the Finance Committee and the Board Chair shall appoint the AB939 Compliance Chair.

1.4 Meetings.

1.4.1 The Board will hold regular meetings, at a minimum, on a quarterly basis.

1.4.2 Special meetings of the Board may be called by the Manager or Officers of the Board when necessary. Special meetings shall be held upon seven (7) days notice by first-class mail, E-Mail, and/or phone by the Agency. Notification will be made to the Member addresses as shown in the Agency's records.

1.4.3 Board meetings may be held through use of conferencing equipment if it does not conflict with the Ralph M. Brown Act. All members must be able to clearly hear each other and be able to be recorded in the minutes.

1.4.4 Voting on agenda items will take place if a quorum of the Board is present. A quorum is designated as a simple majority of Member voting representatives.

1.4.5 Agenda items may be approved by a majority vote of Members present at the Board meeting.

Section 2. Regional Agency Annual Report

2.1 Agency staff will prepare a "LARA Annual Status Report" and provide each Member a copy.

Section 3. Duties of the Board

3.1 The Board is responsible for the following:

- 3.1.1 Selection of the Chair, Vice Chair and Secretary for each year.
- 3.1.2 Development and approval of the Agency's annual budget and review of expenditures.
- 3.1.3 Determination of the annual Membership fees and ensuring the collection of fees.
- 3.1.4 Selection of any additional regional diversion projects for the benefit of Members.
- 3.1.5 Participation in the implementation of regional projects in their jurisdiction.
- 3.1.6 Participation in the development of Agency positions on proposed legislation and/or regulations for the benefit of Members and the Agency.
- 3.1.7 Attendance at Board meetings.
- 3.1.8 Ensuring that annual report information is forwarded to the Agency in a timely manner.
- 3.1.9 Ratification of Committees and Sub-Committees of the Board.

Section 4. Agency Financial Requirements

- 4.1 The Agency shall have a separate account within the City of Los Angeles' Integrated Waste Management Fund. This account will be maintained and serviced by the City of Los Angeles as long as the City of Los Angeles remains a Member of the Agency.
- 4.2 Should the City of Los Angeles withdraw from or be terminated by the Agency, the balance of the Agency funds and financial records will be turned over to the Board.
- 4.3 Should the Agency be dissolved, the balance of Agency funds will be returned in proportion to the Members.

Section 5. Addition of New Member Jurisdictions

5.1 The Agency will have the authority through an action by the Board to add New Member Jurisdictions to the Agency. Each New Member shall have equal rights and responsibilities of all Members.

5.2 Upon application for membership in the Agency, staff will prepare an agenda item which will include an assessment of:

5.2.1 The level of good faith implementation of the applicant's SRRE.

5.2.2 Past, current, and if feasible future diversion rates of the jurisdiction and any potential impact on the Agency;

5.2.3 Impact on the resources of the Agency to provide services, if any;

5.2.4 Other factors that may impact Agency operations.

5.3 The Board will act at least 45 days before the end of the fiscal year on the membership application(s) received.

5.4 A majority vote of the Board is required to approve the new Member(s).

5.5 If an application is not approved by the Board, the Agency will provide a letter to the applicant describing the reasons for the action.

5.6 Upon action of the Board approving new Members, a request will be sent to the California Integrated Waste Management Board (CIWMB) to place an agenda item adding the new members to the Agency.

5.7 New Members will be assessed the next annual fee and a prorated share of assets held by the Agency such as the reserve fund upon action of the Board. Voting status will be conveyed upon the payment of fees by the new Member.

Section 6. Withdrawal and Termination

6.1 Any Member may voluntarily withdraw from this Agreement by filing with the Agency a written notice to withdraw no less than one hundred eighty (180) days prior to the close of the Agency's fiscal year.

6.2 A Jurisdiction's participation and membership may be terminated by the Board for non-performance of its responsibilities and/or duties. Termination may be for the following cause(s) as determined by the Board:

6.2.1 Non-payment of the required annual membership fee;

6.2.2 Lack of good faith implementation of the jurisdiction's CIWMB-approved SRRE;

6.2.3 Lack of good faith implementation of the jurisdiction's CIWMB-approved SB1066 Time Extension;

6.2.4 Lack of good faith implementation of the jurisdiction's CIWMB-approved Compliance Order Work Plan;

6.2.5 Lack of good faith implementation of the jurisdiction's HHWE;

6.2.6 Substantial lack of participation in Member reporting requirements;

6.2.7 Other action(s) by the jurisdiction which are substantially detrimental to the effectiveness and/or viability of the Agency;

6.2.8 Other action(s) not consistent with goals/objectives and/or spirit of AB939.

6.3 The Agency will notify the Members of the potential termination and the intent to place an agenda item on the next Board agenda for termination of membership. The

Member cited in the agenda item will be given a hearing at the full Board meeting before action of the Board.

6.3.1 A two-thirds vote of the Board will be necessary to terminate the membership of a Member of the Agency.

6.3.2 Upon termination, the affected jurisdiction will be refunded its contribution to the reserve fund.

6.4 Upon action of the Board terminating a Member's membership in the Agency, the jurisdiction so affected has (10) days to file a written appeal to the Board along with a plan of correction to remedy the cause(s) that formed the basis of the termination.

6.4.1 The Board has ninety days (90) to act upon an appeal under Section 9.4. After 90 days the previous Board action becomes final.

Section 7. Payment of Civil Penalties Imposed by the California Integrated Waste Management Board (CIWMB)

7.1 The Members hereby agree that the responsibility for any civil penalties incurred pursuant to AB 939 shall be assigned to the Agency. Should a penalty be assessed against the Agency for non-compliance after all administrative remedies are exhausted, the Members hereby authorize the Board to allocate responsibility to the Members.

7.2 In the event of civil penalties, the Manager shall prepare and submit a report to the Board analyzing the cause of the penalty including recommendations for apportioning penalties.

7.3 The Board shall impose civil penalties in proportion to a Member's failure to implement their Source Reduction and Recycling Element and/or Household Hazardous Waste Element.

7.4 Division of civil penalties must be acted upon by a two-thirds vote of the Board. Upon action of the Board, the Agency shall provide the Members written notice regarding their responsibility, including the basis for determining the Member's proportional responsibility. Any Member will be provided an opportunity for a hearing before the Board before the assessment of penalties takes place.

Section 8. Name and Location of Agent for Service of Process

8.1 The name of the regional agency is the Los Angeles Area Integrated Waste Management Authority. The address and primary contact person is the following:

Ms. Karen Coca

LARA Manager

City of Los Angeles

Bureau of Sanitation, SRCRD

433 S. Spring Street, 5th Floor

Los Angeles, CA 90013

Telephone: (213) 473-8242

E Mail: KACoca@san.lacity.org

Section 9. Amendment

9.1 These bylaws may be amended or modified at any time, in a manner consistent with and in furtherance of the purposes of the Joint Powers Agreement, with the written consent of a majority of the Members within the Agency.